MOTION FILED

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No. 00-353

IN THE SUPREME COURT OF THE UNITED STATES

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner,

v.

NEWTOWN TOWNSHIP
AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF AT&T WIRELESS SERVICES, INC., NEXTEL COMMUNICATIONS, INC., AND SBC WIRELESS, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, amici, AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc., respectfully move for leave to file the attached brief of amici curiae in support of the Petition for Writ of Certiorari. Petitioner Omnipoint Communications Enterprises, L.P., has consented to this filing. Respondents have denied consent. Amici have a substantial interest in securing a definitive and consistent interpretation of 47 U.S.C. § 332(c)(7)(B)(i)(II), the portion of the Telecommunications Act of 1996 which preempts actions of local officials which would have the effect of prohibiting the provision of personal wireless services.

Amici, through their subsidiaries and affiliates, are providers of personal wireless services to over 30 million subscribers nationwide. The provision of personal wireless services requires that each provider maintain an interlocking network of transceiver cells located no more than a few miles apart. At any given time amici, on a nationwide basis, are involved in thousands of applications before local land use boards to secure approval of the necessary facilities. The section of the TCA preempting decisions of such boards that would have the effect of prohibiting the provision of wireless services plays an important role in ensuring that such applications receive a fair hearing and that local concerns do not frustrate national telecommunications policy.

Amici submit that the decision of the Third Circuit in this case raises a significant and recurring issue regarding the proper interpretation of the prohibition of service provision. The courts of appeals and district courts are not in accord in their interpretations of this provision, and this uncertainty is

problematic to providers and local government entities. Moreover, the Third Circuit's standard eviscerates the statutory protection intended to be provided by the prohibition of service provision. In areas currently serviced by only one provider, the Third Circuit's standard will have the effect of prohibiting the provision of service to subscribers of all other providers, since, in general, subscribers of one provider cannot receive service through the facilities of another provider. It will also prevent competition, a key goal of the statutory and regulatory framework governing personal wireless services.

As a result, the issues presented in this case are of exceptional importance to amici and their millions of subscribers. Amici seek to promote a consistent interpretation of the prohibition of service provision that is faithful to the statute and consistent with federal telecommunications policy. Amici therefore respectfully seek leave of this Court to file the attached brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amici curiae AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc., through their subsidiaries and affiliates, provide personal wireless services to over 30 million subscribers nationwide. The ongoing process of securing local approvals for the facilities necessary to provide service is a substantial undertaking, involving thousands of applications nationwide at any given time. At the present time there is no consensus on the proper interpretation of that portion of the Telecommunications Act of 1996 ("TCA") proscribing actions of local authorities that have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332 (c)(7)(B)(i)(II) (2000) (the "prohibition restriction"). This uncertainty greatly complicates the application process and subsequent judicial review of application denials.

Moreover, the standard adopted by the Third Circuit is contrary to federal telecommunications policy in that it permits local authorities to deny applications for personal wireless facilities so long as subscribers of one personal wireless provider can receive service. Denial of an application in such circumstances has the effect of prohibiting the provision of personal wireless services to subscribers of other providers. This standard, if permitted to stand, would be highly detrimental to the millions of subscribers of amici as well as the millions of subscribers of other providers.[1]

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than amici curiae and their members made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In the TCA, Congress sought to preserve a role for local authorities in siting personal wireless facilities while ensuring that parochial interests would not frustrate national telecommunications policy. The prohibition restriction seeks to ensure that the ultimate question in land use proceedings is not whether services should be available but where the necessary facilities should be located. The lack of consensus on the proper interpretation of the prohibition restriction is problematic, as applicants and land use boards are uncertain as to the law governing review of decisions on applications for personal wireless facilities. Omnipoint Communications Enterprises, L.P.'s petition should be granted because the Third Circuit's decision turns on this important but unsettled question of federal telecommunications law.

The petition should also be granted because the standard adopted by the Third Circuit rests on the false premise that it is sufficient that one provider service an area. With rare exceptions, however, subscribers of one provider cannot receive service through the facilities of another provider. As a result, the standard permits the prohibition of service to subscribers of other providers so long as subscribers of one provider are able to receive service. This standard misinterprets the TCA to the detriment of the very consumers Congress sought to protect by ensuring the availability of service and promoting competition. It also frustrates the efforts of personal wireless providers to secure approvals for the facilities necessary to provide service to their subscribers. For the prohibition restriction to have any efficacy, it must be applied on a provider-by-provider basis.

ARGUMENT

The cellular telephone[2] has become a staple of American life. There are now almost 90 million personal wireless subscribers in the United States.[3] When the FCC made the decision in 1981 to license personal wireless services, it correctly foresaw its tremendous utility for personal and business use. To make the benefits of this technology available, the FCC made a policy decision to reallocate scarce space in the electromagnetic spectrum to provide the necessary radio frequencies. Reflecting a further policy decision that this technology could best be made available through market forces, the FCC allocated sufficient bandwidth to license multiple providers in each geographic area. In re Cellular Communications Sys., 86 F.C.C.2d 469, 474-482 (1981), reh'g denied, In re Advanced Mobile Phone Serv., Inc. North-West Telephone Co. & GTE Mobilenet of Milwaukee, Inc., 1986 WL 292526 (F.C.C. Jan. 6, 1986). These policy decisions were emphatically reaffirmed in the TCA, which reflects Congress' intent to promote competition and reduce regulation "in order to secure better prices and higher quality services for American telecommunications consumers and encourage rapid

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[2] The term "cellular" has both a generic and technical meaning. Generically, it refers to all forms of personal wireless services provided through an overlapping network of low-powered, short-ranged transceiver cells that reuse the same set of frequencies. Technically, "cellular" refers to the first type of such service licensed by the FCC. The FCC has since licensed other forms of personal wireless services, including Personal Communications Service (PCS) and Specialized Mobile Radio (SMR), which are functionally similar to cellular but have been assigned different operating frequencies.

[3] Fed. Communications Comm'n, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Serv., FCC 00-289, at 5-6 (2000).

deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

Despite the popularity of personal wireless services, however, providers soon encountered local opposition to the facilities necessary to provide service. Land use applications for such facilities were subject to interminable delays and denied for pretextual reasons. This situation threatened to thwart the development of the facility networks necessary for efficient utilization of the frequencies dedicated to personal wireless services. See H.R. Rep. No. 104-204, at 94, reprinted in 1996 Code Cong. & Admin. News, at 61.

In response, in the TCA, Congress preempted certain conduct on the part of local authorities considering applications for personal wireless facilities, and provided for denials of such applications to be reviewed in federal court. 47 U.S.C. § 332(c)(7)(B)(v). The TCA requires that applications for cellular facilities be resolved in a reasonable period of time. § 332(c)(7)(B)(ii). Denials cannot be based on the environmental effects of radio frequency emissions so long as the facility complies with emission regulations. § 332(c)(7)(B)(iv). Local authorities cannot unreasonably discriminate among providers of functionally equivalent services. § 332(c)(7)(B)(i)(I). Decisions denying an application must be in writing and supported by substantial evidence. § 332(c)(7)(B)(iii). The TCA further includes the prohibition restriction, which provides that: "the regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government or instrumentality thereof-- ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services." § 332(c)(7)(B)(i)(II).

In the TCA, Congress sought to preserve a role for local authorities in siting personal wireless facilities while ensuring that parochial interests would not frustrate national telecommunications policy. See H.R. No. 104-204, at 94, reprinted in 1996 Code Cong. & Admin. News, at 61 ("Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services."). The prohibition restriction plays a key role in striking this balance. By mandating the availability of service, it seeks to ensure that the ultimate question in land use proceedings is not whether services should be available but where the necessary facilities should be located.

A. The Petition Should Be Granted to Remedy the Lack of Consistent Interpretation of the Prohibition Restriction.

Judicial interpretation of the prohibition restriction has been anything but consistent. The Fourth Circuit has applied a particularly restrictive interpretation, holding that an individual zoning decision could not violate the prohibition restriction, as in the Fourth Circuit's view the provision applies only to general bans or blanket prohibitions. AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 429 (4th Cir. 1998). Under this view, unless a local authority is impolitic enough to articulate an express ban on personal wireless facilities, the prohibition restriction becomes a dead letter. More recently, in 360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79, 87 (4th Cir. 2000), another panel of the Fourth Circuit, while rejecting standards advanced by the Second and Third

Circuits, indicated in dicta that there might be egregious circumstances in which something less overt than an express ban might rise to the level of a prohibition.

The other circuits which have considered this issue have recognized that since regulation of land use occurs in the context of decisions on individual applications, the prohibition restriction should be given broader scope than provided in Virginia Beach. In Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999), the First Circuit acknowledged that an individual denial could violate the prohibition restriction if the circumstances demonstrated "such fixed hostility by the Board that one can conclude that further applications would be useless." Id. at 14. The Second Circuit also recognized the flaws inherent in the Virginia Beach interpretation, but approached the issue from a different perspective. Whereas the First Circuit approach looks to the totality of circumstances, including any history of other denials, the Second Circuit approach looks to the particulars of a specific application. In Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999), the Second Circuit recognized that if a proposed facility was the least intrusive means of filling a gap in service, it could be presumed that if such an application was denied, any other application would meet the same fate, making the denial an effective prohibition.

The Third Circuit addressed the prohibition issue in two opinions at the end of 1999. In Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus, 197 F.3d 64 (3rd Cir. 1999), the Third Circuit adopted an approach that looks to the practical effect of the denial on subscribers of personal wireless services. It held that a gap exists when a subscriber using a hand-held phone is "unable either to connect with the land-based national telephone network or to maintain a

connection capable of supporting a reasonably uninterrupted communication." Id. at 70. Without defining all of the potentially relevant factors, the Third Circuit indicated that a gap would be significant where, due to its size and/or population density and/or traffic volume, the gap would impact a large number of subscribers. Id. at 70 n.2. It further held that the prohibition restriction would be violated if a local authority denied an application for the least intrusive means of filling a significant gap, based on findings made de novo by the reviewing court, without deference to the factfinding of the local authority. Id. at 71.

In APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3rd Cir. 1999),[4] another panel of the Third Circuit applied the same basic interpretation of the prohibition restriction set forth in Ho-Ho-Kus, only to undermine its efficacy by engrafting upon it what is referred to in Omnipoint's petition as the "all carriers" standard. This standard requires that a provider challenging a denial on prohibition grounds must "include evidence that the area the new facility will serve is not already served by another provider." Id. at 480. In so doing, APT gave an expansive reading to dicta in Willoth, 176 F.3d at 643, suggesting that if one carrier provided sufficient coverage to an area (without any discussion of what was meant by "sufficient"), a prohibition claim might be available only to the first provider to enter that area. In the case that is the subject of the instant petition, Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240 (3rd Cir. 2000), a third panel of the Third Circuit applied the APT standard and held that a provider attempting to establish a prohibition must

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[4] While the opinion in APT Pittsburgh Ltd. P'ship v. Penn Township was filed eleven days prior to Cellular Tel. Co. v. Zoning Bd. Adj. of Ho-Ho-Kus, the APT decision refers to the Ho-Ho-Kus decision's holding on the prohibition point. See APT, 196 F.3d at 475.

show that the area the proposed facility would serve is not already served by another provider.

In sum, in the First Circuit, a prohibition is established through proof of circumstances that it is unlikely that any application would be approved. In the Second Circuit, the prohibition restriction is violated by the denial of an application for the least intrusive means to fill a significant gap, with a suggestion (without any definition of "significant" or "sufficiently"), that there must also be a showing that no other provider sufficiently covers that gap. The Third Circuit has adopted the basic Second Circuit least intrusive means/ significant gap approach and articulated factors defining what is a significant gap, but has engrafted on this the "all carriers" requirement. The Fourth Circuit has required proof of an express ban or policy, with a suggestion that in some egregious case something like the First Circuit's circumstances test might suffice.

In these and other circuits, there are decisions following Virginia Beach, Amherst, Willoth, Ho-Ho-Kus, and/or APT. See, e.g., Airtouch Cellular v. City of El Cajon, 83 F. Supp. 2d 1158, 1167-68 (S.D. Cal. 2000) (following APT); Cellular Tel. Co. v. Zoning Bd. of Adj. of Harrington Park, 90 F. Supp. 2d 557, 560-61 (D.N.J. 2000) (following Ho-Ho-Kus); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d 108, 118 (D. Mass. 2000) (following Amherst and Ho-Ho-Kus); SNET Cellular, Inc. v. Angell, 99 F. Supp. 2d 190, 197 (D.R.I. 2000) (following Amherst); APT Minneapolis, Inc. v. Eau Claire County, 80 F. Supp. 2d 1014, 1025 (W.D. Wisc. 1999) (following Amherst); Bellsouth Mobility, Inc. v. Parish of Plaquemines, 40 F. Supp. 2d 372, 381 (E.D. La 1999) (following Virginia Beach); Nextel Partners of Upstate N.Y., Inc. v. Town of Canaan, 62 F.Supp. 2d 691, 697

(N.D.N.Y. 1999) (following Willoth); Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County, 59 F. Supp. 2d 1101, 1109 (D. Colo. 1999) (following Amherst). This confusion is not only problematic for TCA cases currently in litigation, but also for the thousands of applications currently before local land use boards. Given the importance of the issue and the confusion associated with it, the situation cries out for a definitive resolution.

B. The Petition Should Be Granted To Correct Erroneous Interpretation of A Key Statutory Provision.

The need for a definitive determination is even more acute because the standard adopted by the Third Circuit is wrong on the facts, wrong on the law, and directly in conflict with the policies underpinning the establishment of wireless service and articulated in the TCA itself. The facility networks of different providers in an area are not identical. This leads to inevitable situations where service is available to subscribers of one provider in areas that are significant gaps in the networks of other providers.[5] In such circumstances, the Third Circuit's standard denies the existence of a gap, on the assumption that the availability of service by one provider in that area is sufficient. This assumption ignores the fact that, except in very limited circumstances, subscribers of one provider cannot receive service through the facilities of another provider. As a result, the denial of an application in an area where only one provider has adequate coverage will result in the prohibition of service to subscribers of all other providers.

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[5] See In re Revision of Rules to Ensure Compatibility with Enhanced 911 ECS, 14 FCC Rcd. 10,954, ¶ 6 (June 9, 1999) (describing effects of gaps in a provider's network).

There are several technical reasons why subscribers of one provider cannot receive service through the facilities of another provider. First, providers operate on different frequencies. There are three functionally similar but technically different types of personal wireless service: cellular, PCS and SMR. In re Revision of E911 ECS, 14 FCC Rcd. 10,954, at ¶ 3. As a matter of federal policy favoring competition, in most areas there are competing providers for each type of service. Each type of service has been allocated a different frequency range, and each provider has been assigned different sets of channels within that range.

There are also differences between analog and digital service. Cellular providers initially utilized an analog format, although in some areas cellular providers now offer analog and digital service side-by-side. PCS and SMR are exclusively digital. Id. Analog-only phones (which are still in service) cannot process digital signals, and digital-only phones cannot process analog signals.

Finally, digital providers use a variety of incompatible formats for modulating their signals including GSM, CDMA, TDMA, and IDEN. Current phones programmed in one format cannot process signals transmitted in another. Id. at ¶ 35 n.47. For example, if Omnipoint uses a GSM format and Sprint uses a CDMA format, even though Omnipoint and Sprint are both PCS providers, their subscribers will not be able to receive service from each others' networks.

There are minor exceptions to the general rule that subscribers to one provider cannot receive service from the facilities of another. These exceptions prove the general rule

that one provider is insufficient to provide service to an area. In areas where there are two analog cellular providers (the "A" provider and the "B" provider), subscribers with the proper phones who know how to do so can, with difficulty, program their phones to receive the analog signal of either carrier.[6] This option results in substantial roaming charges in instances where the phone locks onto the signal of a provider other than the subscriber's provider. Even when it is possible to do so, using the facility of another provider generally requires initiating a new call, obtaining operator assistance and use of a credit card.

Not only is this practice cumbersome, it does not permit a subscriber to maintain a connection when moving between cells, an integral element of the definition of "service" utilized by both the Second and Third Circuit tests. See Ho-Ho-Kus, 197 F.3d at 70 (citing Willoth, 176 F.3d at 643). It is also limited to instances of a cellular subscriber accessing the analog signal of another cellular provider. It will not permit a cellular subscriber to receive digital cellular service from another cellular provider, or from a PCS or SMR provider, nor will it permit PCS or SMR subscribers to receive service from a cellular provider. In re Revision of 911 ECS, 14 FCC Rcd. 10,954, at ¶ 35.[7]

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[6] Overriding a phone's A/B programming in this manner is sufficiently impractical and cumbersome that the FCC has described the prospects of most subscribers doing so as theoretical. In re Revised E911 ECS, 14 FCC Rcd. 10,954, ¶ 21. To avoid unwanted roaming charges, most subscribers' phones are programmed in "A" only or "B" only mode. Id. at ¶¶ 21-26 (explaining need for special automatic routing of 911 calls between "A" and "B" providers).

[7] Using a "dual band" phone, it is possible for some PCS subscribers to receive service from certain cellular providers, but only if an intercarrier agreement is in place between the providers. Even in such circumstances, a subscriber will not be able to maintain a connection when moving between the PCS and cellular networks.

A second exception is limited to 911 calls. Analog cellular phones entering the market as of February 13, 2000, are required to automatically override an "A" only or "B" only setting to permit a 911 call. 47 C.F.R. § 22.921 (1999). This increases the chance of a 911 call going through in areas where the analog signal of a cellular subscriber's provider is not strong enough for reliable service. It is also intended to provide 911 service in circumstances in which, due to call volume, the subscriber's provider does not have a channel available to carry the 911 call.[8] In re Revised E911 ECS, 14 FCC Rcd. 10,954, at ¶ 44. Because this feature is limited to 911 calls made on new analog cellular phones, however, id. at ¶ 2, it would not benefit users in an area served only by a provider of digital personal wireless services. If, for example, the only provider in an area is an SMR carrier, application of the Third Circuit's standard would prohibit all cellular and PCS providers (and SMR providers using different modulation formats) from erecting the facilities necessary for their subscribers to receive 911 service.

Both Congress and the FCC have placed a premium on making 911 service available to all subscribers. See, e.g., Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) (articulating public policy in favor of "the construction and operation of seamless, ubiquitous, and reliable telecommunications

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[8] Limiting an area to service by one provider would lead to capacity problems for that provider for both 911 and non-emergency calls, increasing the likelihood that even that provider's own subscribers will be blocked from receiving service. It would also be wasteful, as all but one set of the frequencies allocated for personal wireless service would go unused in such an area, in contravention of federal policies seeking to ensure efficient use of the electromagnetic spectrum. 47 U.S.C. § 301.

systems" as a means of providing 911 service); In the Matter of Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Sys., 12 F.C.C.R. 22,665 (1997); 47 C.F.R. § 20.18 (requiring all providers to process wireless 911 calls made on a phone compatible with the provider's radio frequency protocol and to provide Enhanced 911 call location services); In re Revised E911 ECS, 14 FCC Rcd. 10,954 (requiring automatic A/B access for 911 analog cellular calls). For this reason alone the Third Circuit's standard is problematic, as it is inconsistent with Congressional intent and the federal regulatory scheme. It is also a threat to public health and safety, as subscribers of the denied applicant will not have access to 911 service in the affected area.

The standard also directly conflicts with the prohibition restriction's focus "upon the end result to the consumers and their reception of uninterrupted wireless telephone service." Newtown Township, 219 F.3d at 244. The fact that service is available to subscribers of another provider is irrelevant to subscribers of the provider seeking to fill the gap. A subscriber of a provider without coverage in an area is "unable to connect with the land-based national telephone network or to maintain a connection capable of supporting a reasonably uninterrupted connection." Ho-Ho-Kus, 197 F.2d at 70 (defining elements of prohibition of service). The "end result" to the consumer is that he or she cannot use their phone. In this regard it is important to note that, as a practical matter, the prohibition restriction comes into play when a local decision not subject to challenge under other provisions of the TCA leaves a significant gap in a provider's network under circumstances in which it is reasonable to assume any other application to fill this gap will meet the same fate. If relief under the prohibition restriction is not available in these circumstances, no relief is

available. The applicant's subscribers must simply do without service in the affected area.

Congress could not have intended the prohibition restriction to be interpreted in a manner that would deem it sufficient that there be only one provider in an area.[9] State and local authorities have no authority to regulate market entry by providers of personal wireless services. 47 U.S.C. § 332(c)(3)(A). The federal regulatory scheme for personal wireless service has always rested upon the availability of multiple providers in each area. In establishing cellular service, the FCC considered and rejected licensing schemes in which one provider would be deemed to provide sufficient service to an area. In re Cellular Communication Sys., 86 F.C.C.2d at 471-72. It preempted state licensing schemes which might have the effect of finding a need for only one cellular carrier in an area, finding that "requiring demonstration of a general public need for cellular service could adversely affect our frequency allocation or delay the rapid implementation of cellular service, both of which are central elements of the federal design for cellular operations." Id. at 505. It also noted that "the inability of any cellular licensee to provide service could significantly

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[9] Section 253(a) of the TCA contains language, similar to the prohibition restriction, that prohibits State and local legal requirements that "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The FCC has, consistently, interpreted this language to "proscribe state and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular state or locality." In the Matter of Silver Star Tel. Co., Inc. Petition for Preemption and Declaratory Ruling, 12 FCC 15639, ¶ 38 (1997). See also Public Util. Comm'n of Tex. et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Tex. Public Util. Regulatory Act of 1995, 13 FCC Rcd. 3460, 3480 ¶ 41 (1997) (section 253 prohibits state or local requirements that have the practical effect of prohibiting an entity from providing service).

inconvenience the public and cause a huge amount of spectrum to be unused." Id. at 502.

Reflecting this basic assumption that there would be multiple providers throughout a service area, the regulations governing cellular carriers provide that "[c]ellular system licensees must provide cellular mobile radiotelephone service upon request to all cellular subscribers in good standing, including roamers, while such subscribers are located within any portion of the authorized cellular geographic service area..." 47 C.F.R. § 22.901. (emphasis added). The FCC further reinforced this policy of multiple providers by subsequently taking sufficient bandwidth away from other uses to permit up to six PCS providers and at least one SMR provider per market area. See 47 C.F.R. § 24.1 (allocating bandwidth for PCS service); 47 C.F.R. § 90.661 (allocating bandwidth for SMR service). It did so out of a conviction that the then current availability of service from two providers was insufficient to provide the desired competition and availability of service. See In re Implementation of Section 6002(B) of ORBA 1993, 10 FCC Rcd. 8844, ¶ 4 (1995). See also H.R. Rep. 111, 103d Cong. 1st Sess. 261-62 (1993) (goal of amendments to 47 U.S.C. § 332(c) in Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title IV, § 6002(b), is to ensure "increased competition and subscriber choice" with respect to personal wireless services).

The assumption that it is sufficient that only one provider service an area is antithetical to the personal wireless regulatory scheme, which has consistently rejected the notion that one provider is sufficient. When it enacted the TCA in 1996, Congress can be presumed to have been familiar with this understanding of what was encompassed by "personal wireless services." Indeed, the regulatory

scheme is completely consistent with Congress' stated intent in enacting the TCA to secure better prices, higher quality services, and encourage rapid deployment of new telecommunications technologies by promoting competition and reducing regulation. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

The Third Circuit's holding that the prohibition restriction permits the prohibition of service to subscribers of other providers, so long as subscribers of one provider are able to receive service, misinterprets the statute. It does so to the detriment of the very consumers Congress was trying to protect. For the prohibition restriction to have any efficacy, it must be applied in a manner that permits each provider to erect the facilities necessary to provide service to its subscribers.

CONCLUSION

For the reasons set forth above, amici curiae AT&T Wireless Services, Inc., Nextel Communications, Inc. and SBC Wireless, Inc., respectfully request that the Petition for Writ of Certiorari of Omnipoint Communications Enterprises, L.P., be granted.

Respectfully submitted,

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